

OAH Docket No. 2-3001-8525-2  
TRB File No. HHG 74541/A-93-315

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of 1st Choice Movers,  
Inc., 4505 Nathan Lane, # 211,  
Plymouth, Minnesota 55442: Petition  
for Household Goods Mover Permit  
Authority to Transport Household  
Goods, Restricted to Personal Effects  
and Property Used or to be Used by  
the Owner in the Owner's Dwelling  
Between All Points In Minnesota.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
RECOMMENDATION

The above-entitled matter came on before Administrative Law Judge Allen Giles on March 14, 1994, at the Transportation Regulation Board's Second Floor Hearing Room, Administrative Truck Center, 100 Stockyards Road, South St. Paul, Minnesota 55075.

Appearing on behalf of the Applicant, 1st Choice Movers, Inc. (hereinafter also referred to as "1st Choice" or "the Company") was Curtis M. Wiseman, Bester & Wiseman, Attorneys at Law, 5 East County Road B, Suite 5, St. Paul, Minnesota 55117.

Appearing on behalf of the Protestant, Bester Bros. Transfer and Storage Company (hereinafter also referred to as "Bester" or "the Protestant") was Douglas B. Bester, Owner and Manager, 818 North Concord Street, South St. Paul, Minnesota 55075.

The record closed on May 26, 1994, upon receiving correspondence regarding 1st Choice's submission of a Post-Hearing Reply Brief.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, and the Rules of Practice of the Transportation Regulation Board, and the Rules of the Office of Administrative Hearings, exceptions to this Report, if any, by any party adversely affected must be filed within 20 days of the mailing date hereof with the Transportation Regulation Board, Minnesota Administrative Trial Center, 254 Livestock Exchange Building, 100 Stockyards Road, South St. Paul, Minnesota 55075. Exceptions must be specific and stated and numbered separately. Proposed Findings of Fact, Conclusions and Order should be included, and copies thereof shall be served upon all parties. If desired, reply to exceptions may be filed and served within ten days after the service

of the exceptions to which reply is made. Oral argument before a majority of the Board may be permitted to all parties adversely affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions or reply, and an original and five copies of each document must be filed with the Board.

The Minnesota Transportation Regulation Board will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Board may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that said recommendation has no legal effect unless expressly adopted by the Board as final order.

#### STATEMENT OF ISSUE

Whether 1st Choice Movers, Inc. has met the conditions necessary for issuance of a household goods mover permit as required by Minn. Stat. § 221.121, subd. 1 (1992). More specifically whether (a) 1st Choice is fit and able to conduct the proposed operation; (b) whether the Company's vehicles meet the safety standards established by the Minnesota Department of Transportation; (c) whether there is a need for the transportation services proposed in the application; and (d) if a need exists whether Protestant offers sufficient services to fully and adequately meet the need?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

##### Procedural and Notice Requirements

1. On June 17, 1993, 1st Choice filed an application with the Minnesota Department of Transportation seeking permit authority to operate as a Household Goods Carrier. On June 23, 1993, the Application was filed with the Transportation Regulation Board. Exhibit 1.

2. On July 2, 1993, and weekly thereafter, the Board published notice of the Application in its Weekly Calendar. Interested persons were given until July 22, 1993 to file protests against the Application.

3. A timely protest to the Application was filed by Bester Bros. Transfer and Storage Company. By letter dated July 28, 1993, the Board informed 1st Choice that because a protest had been filed a hearing would be

necessary. Prior to any such hearing, the Applicant was advised to contact Protestant to discuss and consider settlement. After unsuccessful settlement discussions, the Board issued a Notice of Hearing on January 21, 1994, setting the matter for contested case hearing. The Notice of Hearing was published in the Board's Weekly Calendar beginning January 21, 1994, and continuing up to and including the date of the hearing. The Notice indicated that a hearing on the Application would be held on February 28, 1994, at the Administrative Trial Center, 100 Stockyards Road, Second Floor Hearing Room, South St. Paul, Minnesota 55075. The Notice of Hearing was served upon the Applicant and the Protestant on January 21, 1994.

4. The matter was referred to the Office of Administrative Hearings for the purpose of conducting a contested case hearing. The hearing date was continued to March 14, 1994, at which time a hearing on the merits of the Application was held.

#### Description of Applicant and Proposed Transportation Service

5. 1st Choice Movers, Inc. was incorporated on May 7, 1993; the officers and shareholders of the Company are Ronald C. Kilgore, President, and Milton Jones, Vice President and Secretary. Mr. Kilgore and Mr. Jones are the only employees of 1st Choice. The primary business service currently offered by 1st Choice is cleaning or removing rubbish from basements, attics and garages. As a part of the cleaning operation 1st Choice hauls away rubbish or refuse collected in basements, attics and garages. Mr. Kilgore and Mr. Jones have planned that at some point in the future to also begin a household goods moving business.

6. Mr. Kilgore has five years experience driving school buses and transit buses for Medicine Lake Lines from 1987 through 1992. Near the end of his employment with Medicine Lake Lines Mr. Kilgore also took on the responsibilities of dispatching and training other drivers. Mr. Jones was also a driver for Medicine Lake Lines where he was employed for approximately seven years. During that time Mr. Jones drove school buses, city buses, and motor coaches. From 1980 to 1983 Mr. Jones served in the U.S. Army at Fort Lewis, Washington where he drove tractor trailers and other cargo vehicles for the U.S. Army. At the present time both Mr. Jones and Mr. Kilgore are newspaper carriers for the Star and Tribune. They attend to the newspaper routes in the early morning and work for 1st Choice for the rest of the day.

7. 1st Choice has applied for motor carrier operating authority as a household goods mover. The Company's application seeks permit authority to transport household goods, restricted to personal effects and property used to be used by the owner in the owner's dwelling, between all points in Minnesota.

8. 1st Choice is seeking to handle personal household goods for a special target market consisting of low income and minority persons in the Minneapolis/St. Paul Metropolitan Area. They propose to gain access to this market from narrow and specific advertising and solicitation uniquely suited for the target market. 1st Choice intends to use fliers, brochures, attendance at events for low income and minority persons and networking with other businesses focused upon delivery of services to low income and minority persons. 1st Choice has advertised in the Black Pages, a publication intended to showcase minority businesses, primarily African American. The Company has attended conventions and job fairs for minority enterprise networking. At the job fairs and conventions 1st Choice has distributed coupons and brochures.

1st Choice has advertised to the target market using coupons, brochures, signage, advertising in newspapers, including the Highland Villager and U.S. West Yellow Pages.

9. 1st Choice has priced its services at approximately 50 to 55 dollars an hour to attract customers from the target market. 1st Choice intends to start with apartments and small dwellings, targeting persons who would consider getting a truck and doing the move themselves. After 1st Choice has begun its moving business the Company hopes to get a boost by word-of-mouth promotion from persons in the target market.

10. 1st Choice uses three motor vehicles to provide its business services. They are a 1980 Ford pickup, 1980 Econoline Van, and a 1988 Ford F700. The 1980 Ford pickup has walls built on the back for transporting rubbish and refuse removed from basements or attics. It is not intended to be used for moving household goods. The primary vehicle to be used for moving household goods is the 1988 Ford F700. This vehicle is intended to be used as a moving van. It is a straight truck with a 10-foot high, 24-ft. long box and a ramp on the back. The box has hooks on the side for securing furniture and a wood grain floor. The Econoline Van will also be used in moving household goods. The van has a 14-1/2-foot box, and a sliding door with no ramp. 1st Choice has an assortment of ancillary equipment necessary for use in moving household goods. That equipment includes thick blankets, straps, bungee cords, padding and dollies.

11. 1st Choice began its business operations hauling away refuse and rubbish in connection with cleaning basements, attics and garages. When 1st Choice first started in business there was no intention that the Company would also be hauling household goods. 1st Choice did not purchase the 1988 Ford F700 (the moving van) until sometime after it had filed the subject application for motor carrier authority.

12. Mr. Kilgore believed that it would take only 60 days to get a permit and another 45-day period to achieve compliance with other motor carrier requirements and vehicle standards. In anticipation of being granted authority, 1st Choice placed an ad in the Minneapolis Yellow Pages. 1st Choice also placed an ad in the Highland Villager, a St. Paul neighborhood newspaper. The Highland Villager ad ran for three to four months in the Fall of 1993. Mr. Kilgore was aware that there was not a "haul away" service in St. Paul as there was in Minneapolis; he believed that placement of the ad in the Highland Villager would increase 1st Choice's basement, attic, garage cleanup and rubbish hauling business. Although the Highland Villager ad was intended as a rubbish removal advertisement, it also included the word "moving". The language in the ad is as follows:

MOVING    HAULING    CLEANING    BASEMENTS    GARAGES    ATTICS

Ex. 5.

13. As a result of 1st Choice's advertising in the Black Pages and attendance at job fairs, 1st Choice received over 80 to 100 calls for its cleaning/rubbish and moving services. Approximately 85% of those calls came from the intended target market.

14. As a result of the Highland Villager ad, which ran for three to four months, 1st Choice had three to four rubbish hauls and moved one person. As

result of the Minneapolis Yellow Pages ad, six or seven moves have occurred since mid-November.

15. 1st Choice held a prehearing settlement conference at the Transportation Regulation Board to attempt to resolve the protest filed by Bester Bros. Transfer and Storage. The Applicant was unable to get Bester to withdraw its protest of the Application. During the settlement conference 1st Choice was informed that it needed a permit to provide household goods moving.



service. As a result of that meeting Mr. Kilgore obtained the mistaken belief that he and Mr. Jones could have an "informal" moving service but that 1st Choice could not begin a "full operation" as a Household Goods Carrier until the Company obtained its permit.

16. Bester would support 1st Choice becoming a household goods mover if the Company purchased a permit from an existing household goods carrier. Bester opposed 1st Choice becoming a household goods mover because the Company was applying for new authority.

17. After the settlement conference Bester filed a complaint with the Minnesota Department of Transportation in December, alleging that 1st Choice was advertising and holding itself out as a Household Goods Carrier without permit authority required by the Motor Carrier Law. Upon receipt of the complaint, the Department of Transportation sent to 1st Choice a letter dated December 20, 1993 containing a "Notice of Alleged Violation". Ex. 9. 1st Choice responded to the "Notice of Alleged Violation" in a letter dated January 3, 1994. In a letter signed by the President of 1st Choice, Inc., Mr. Kilgore, the Company responded in part as follows:

We at 1st Choice Movers, Inc., are currently in the process of obtaining authority for operating as a motor carrier in the state of Minnesota.

We also have been doing residential rubbish hauling in the metropolitan area. This usually consists of basement, attic, and garage cleanups. It was and is our understanding that the hauling of rubbish to the authorized dumping sites is not in violation of any state laws or statutes. We have performed some moves for friends, and relatives in an attempt to explore the waters of what we believe will be a beginning of a new and exciting career for our new business.

It has been and will continue to be our intention to comply with all regulations regarding the transportation of any goods in the state of Minnesota. If any rules or regulations have been violated or overlooked on our part we will immediately cease them until the matter regarding our application for authority is completed.

We do hope the matter regarding our application for authority can be quickly completed, and we are looking forward to the opportunity to become a part of the business community.

Ex. 7.

18. Mr. Kilgore acknowledged at the hearing that he believed 1st Choice made initial mistakes and moved too soon with respect to its advertising and made household moves that it had no authority to make, but that the Company intended to comply with its responsibilities as a regulated motor carrier. stated in part as follows as a part of his testimony:

Our intention is to run a service that is in complete compliance all the time. One thing that we did not anticipate was a lengthy process as far as filing a petition. . . We made some initial mistakes. . . We have not intended to go out and disregard the law.

19. The officers of 1st Choice have expressed a desire and willingness to comply with motor carrier regulations in the event 1st Choice is authorized as a regulated motor carrier in this state. The officers of 1st Choice have expressed a desire to attend motor carrier introductory classes to acquaint themselves with the responsibilities of a regulated motor carrier within the state of Minnesota.

20. 1st Choice filed a Statement of Assets and Liabilities dated June 1993, along with its application for motor carrier operating authority. The statement indicates that 1st Choice has a net worth of \$5,577.12. There have been two major changes to the Company's assets and liabilities since June 1993; those changes include the acquisition of the moving van, the 1988 Ford F700 for \$12,900.00 and the addition of approximately \$1,000.00 in accessory equipment to be used by the business.

21. The 1988 Ford F700 moving van and the Ford Econoline Van will be used in providing the proposed household goods moving service. The 1988 Ford was recently purchased from Boyer Ford Trucks which currently provides maintenance on the vehicle. Boyer Ford Trucks performed an inspection on the 1988 Ford on February 28, 1994. As Exhibit 6 indicates, 1st Choice's moving van had no uncorrected mechanical problems and passed the vehicle inspection performed by Boyer Ford Trucks. 1st Choice also intends to use Winetka Repair and First Line Engine Repair to provide maintenance on the vehicles in the future.

22. An unofficial survey of the rates charged by household goods movers conducted by 1st Choice management showed that household goods movers rates varied from \$52.00 to \$83.50 per hour, not including potential ancillary charges. 1st Choice's proposed rate of \$50.00 to \$55.00 per hour would place the company among the lowest rates available in the Minneapolis/St. Paul Metropolitan Area. Ex. 4.

#### Need for the Proposed Household Goods Moving Service

23. Eric A. Walters of Plymouth, Minnesota, testified in support of the Application. Because of his wife's job he has had to move six times in the past ten years between several states and from and back to the Minneapolis area. He knows the officers of 1st Choice and has trust and confidence in their ability to be household goods movers. Mr. Walter plans a move in the near future. Mr. Walters does not desire to move his household goods himself because he is handicapped, having lost the use of one of his arms after an industrial accident. He will need the assistance of a household goods mover.

24. Because Mr. Walters has a need for a household goods mover he contacted approximately seven major household goods movers to inquire about their costs and services. He called local and major companies and discovered that prices fluctuated among the moving companies but that the general per-price was approximately \$65 to \$75. The per-hour charge varied based

on charges for certain services. For example, there were charges for packing of household goods, charges for "port to port", workers stayed on the clock during half-hour lunch, add-on charges for third floor, sleeper sofa, elevator, oversized boxes, refrigerator or stove. After obtaining this information it was difficult for Mr. Walters to figure out what price would actually be charged because the various add-on charges were different from carrier to carrier.

25. Mr. Walters has confidence in 1st Choice because he knows both of the owners personally and because the price for the service is easily understood compared to the charges of other motor carriers. Being a minority business owner himself, Mr. Walters believes in supporting minority businesses.

26. Mr. Allen J. Brown is a postal worker who last moved four years ago when he moved from 38th and Oakland to 39th and 15th Avenue in Minneapolis. For the move that he made four years ago he used a group of friends and relatives because he believed that he could not afford the cost that Household Goods Carriers would charge. Mr. Brown has lived in Minneapolis 20 years and has moved three other times. Each time he used friends or relatives because of his perception of the cost.

27. Mr. Brown will be purchasing a new house and intends to move some time within the next nine months. He has looked at homes in Minneapolis, Brooklyn Park, Apple Valley, Richfield and Bloomington. He has gone to a realtor recently and searched the market and looked at different houses. He has not searched the market for movers and has only heard that it would be more costly than moving himself. He knows Mr. Kilgore and of his business venture as a household goods mover. Mr. Kilgore helped Mr. Brown's daughter move from one apartment to another recently and Mr. Brown knows that his daughter who earns approximately \$5 to \$6 per hour could not have afforded to hire a moving company. Mr. Brown would like to hire 1st Choice to move his three bedroom house within the next nine months. Cost has always been a factor to him, although at this time he is able to afford to hire a mover he is still more likely to call someone who he is familiar with and who would help him with the moving rather than a large household moving company. He has known Ron Kilgore all his life, has confidence in his business venture and desires to support this minority business enterprise.

#### Protesting Carrier

28. Protestant Bester Bros. Transfer and Storage has been in the motor carrier business since 1917. Bester holds motor carrier operating authority as a statewide Household Goods Carrier, a Class II-T Carrier, Class II-L Carrier and as a Temperature-Controlled Commodities Carrier. Bester's base of operations is located at 818 North Concord in South St. Paul, Minnesota.

29. Ninety percent of Bester's revenues are from transporting household goods. For its household goods services Bester charges a base rate of \$74.50 per hour. It employs 25 employees and owns nine vehicles used to provide transportation services within its various motor carrier operating authorities.

30. Bester does not claim and has not attempted to prove that it offers motor carrier services that fully and adequately meet the needs of the target market identified by 1st Choice. Bester's opposition to the application is

based on a claim that the general household goods moving industry is in a state of overcapacity. There are 95 separate moving companies listed in the Minneapolis Yellow Pages Directory. There are 75 separate moving companies listed in the St. Paul Yellow Pages Directory. Bester believes that 1st Choice should purchase a permit from a current permit holder instead of applying for new permit authority.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Minnesota Transportation Regulation Board and the Administrative Law Judge have jurisdiction of the subject matter of the hearing herein pursuant to Minn. Stat. §§ 14.57 - 14.62, 174A.02, subd. 4 and 221.121, subd. 1 (1992).

2. The Minnesota Transportation Regulation Board gave proper notice of the hearing in this matter, has fulfilled all relevant, substantive and procedural requirements of law or rule and the Board has the authority to take the action proposed.

3. Minn. Stat. § 221.121, subd. 1 requires that the following conditions be met prior to the issuance of household goods mover permit authority:

- (a) That the applicant is fit and able to conduct the proposed operation;
- (b) That Applicant's vehicles meet the safety standards established by the Minnesota Department of Transportation;
- (c) That the area to be served has a need for the transportation services proposed in the application; and
- (d) That existing carriers have failed to prove that they offer sufficient services to fully and adequately meet the need.

4. The Applicant has the burden of proving by a preponderance of the evidence that it has met the conditions, subparagraphs (a) through (c) above. If a need for the proposed transportation service is proved, then the Protestant Carrier has the burden of proving by the preponderance of the evidence that it offers sufficient services to fully and adequately meet the need.

5. The term "fit and able" is further defined in Minn. Rules Pt. 7800.0100, subp. 4 as follows:

The term 'fit and able' shall mean that the applicant is financially able to conduct the proposed business; that the applicant's equipment is adequately and properly maintained;

that the applicant is competent, qualified and has the experience necessary to conduct the proposed business; that the applicant is mentally and physically able to comply with the rules, regulations and statutes of the commission.



6. The Applicant has the financial ability to render the proposed household goods moving service. The vehicles that Applicant proposes to use to provide the proposed transportation service meet the safety standards of the Minnesota Department of Transportation and are regularly maintained by Applicant's agents. Applicant has shown an affirmative willingness to be subject to the regulatory responsibilities of a motor carrier possessing operating authority.

7. Applicant has failed to prove that there is statewide need for the household goods moving service proposed in the Application. Although Applicant has failed to prove a statewide need for the proposed household goods moving service, it has proved pursuant to Five Star Trucking, Inc. v. Minnesota Transportation Regulation Board, 370 N.W.2d 666 (Minn. Ct. App. 1985), that there is a need for the household goods moving service for low income and minority persons within the Minneapolis/St. Paul Metropolitan Area.

8. Protestant has failed to prove that it offers sufficient services to fully and adequately meet the need identified in this proceeding. Protestant has also failed to offer credible evidence that other carriers offer services to meet the need of the target market proposed to be served by 1st Choice.

9. Minn. Stat. § 174A.02, subd. 4 (1992) establishes a process whereby a motor carrier must file a protest within 20 days of announcement of a petition for motor carrier operating authority to become a protestant in an application for motor carrier operating authority. A motor carrier who fails to file a protest may not become a protestant in the proceeding.

10. Minn. Rules Pt. 1400.6200 allows a person to file a Petition to Intervene in motor carrier proceeding pending before the Office of Administrative Hearings. A person who fails to file a Petition to Intervene may not be allowed to participate as an intervenor in a motor carrier proceeding pending before the Office of Administrative Hearings.

11. Any Findings which might properly be termed Conclusions, and any Conclusions which might properly be termed Findings are hereby adopted as such. The Administrative Law Judge makes these Conclusions for the reasons given in the attached Memorandum. Where necessary, reasons contained in the Memorandum are adopted and incorporated herein as Conclusions.

THIS REPORT IS NOT AN ORDER AND NO AUTHORITY IS GRANTED HEREIN. THE TRANSPORTATION REGULATION BOARD WILL ISSUE THE ORDER OF AUTHORITY WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

IT IS THE RECOMMENDATION of the Administrative Law Judge to the Board that it issue the following:

ORDER

That the Petition of 1st Choice Movers, Inc. for household goods mover permit authority to transport household goods, restricted to personal effects and property used or to be used by the owner in the owner's dwelling be and hereby is GRANTED with the geographical restriction that such services may only be provided within the Minneapolis/St. Paul Metropolitan Area.

Dated this 10th day of June, 1994.

s/Allen E. Giles

ALLEN E. GILES

Administrative Law Judge

### NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to send its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped

### MEMORANDUM

Minn. Stat. § 221.121, subd. 1 requires that an applicant for motor carrier operating authority prove by a preponderance of evidence that it has met the conditions required for issuance of motor carrier operating authority identified in Conclusion No. 3. An applicant's obligation to affirmatively establish these conditions is well-established by Minnesota courts. Appeal Signal Delivery Service, Inc., 288 N.W.2d 707 (1980); Five Star Trucking, Inc. v. Minnesota Transportation Regulation Board, 370 N.W.2d 666 (Minn. Ct. App. 1985).

#### Fitness and Ability

1st Choice has an affirmative obligation to prove that it is "fit and able" to perform the proposed transportation services. The Judge finds that the Applicant is solvent and believes that 1st Choice has the financial ability to operate the proposed business. The two vehicles to be used in providing proposed service are in good operating condition and will be regularly maintained according to MDOT safety standards.

Fitness also relates to a motor carriers' knowledge of laws that regulate motor carriers and the willingness and ability of the motor carrier to comply with those standards. Protestant Bester asserts that the management of 1st Choice has very little knowledge of motor carrier laws and cannot be expected to comply. Bester also claims that 1st Choice is not fit and able to perform as a regulated carrier because 1st Choice has provided unauthorized moving services and has advertised in the Minneapolis Yellow Pages and the Highland Villager. Based on the advertisements and the unauthorized moves, Bester asserts that 1st Choice operated and held itself out as authorized to provide household goods moving service when the Company had no such authority.

The Transportation Regulation Board has denied recent applications for authority on the basis that the applicant is unfit as a result of violating motor carrier laws or engaging in illegal motor carrier operations. Petition of Spirit Coaches, Inc., CHTR 59202/E-89-100 (August 22, 1990); Petition of Glen D. Wilson Transfer of Authority, IRRC 942 61793/T-88-301 (June 12, 1990). The traditional test of whether an applicant's prior violations of motor carrier statutes will render the applicant unfit to conduct the proposed

operations has been framed in terms of the previous violations evidencing a continuing and willful disregard for the law. Brinks, Inc. v. Minnesota Public Utilities Commission, 355 N.W.2d 446, 450 (Minn. Ct. App. 1984). Over a number of cases, the Public Utilities Commission and the Board have established a standard that applies to this issue. The Board has determined that flagrant persistent illegal activity evidencing a character or mind which makes it unlikely that the carrier will comply with the transportation rules and regulations of the state renders the carrier unfit. In the Matter

of the Petition of Twin Cities International Courier, Inc., CSC 5-338/ A-83  
354, Order 5, (March 12, 1984);

In the Matter of the Petition of Howard Taylor d/b/a  
Taylor Transfer and Metropolitan Contract Services, Inc. to transfer local  
cartage authority LCC 713, 827/T-84-304 (May 30, 1985).

On the record of this proceeding 1st Choice's activities do not rise to the standard necessary for concluding that the Company is unfit to be a regulated motor carrier. 1st Choice placed ads in various publications prior to the time that it was authorized to provide household goods carrier services. By placing the ads in the Minneapolis Yellow Pages and the St. Paul Highland Villager newspaper, 1st Choice was holding itself out as a household goods carrier when it did not have authority to provide those services. Mr. Kilgore admitted that the Company moved quicker than perhaps it should have but explained that the ads were placed under the mistaken belief that the application process would not be as protracted as it has become. Mr. Kilgore also testified that he believed that the requirement for operating authority applied to a "full-fledged" operation as a moving company. Upon being informed by the Minnesota Department of Transportation by the letter that included the "Notice of Violation", Mr. Kilgore testified that he proceeded to conform the business to the restrictions listed in the letter from the Department of Transportation. The Judge concludes that the advertisements and moving services by 1st Choice were inadvertent and occurred as a result of misunderstanding and lack of knowledge. 1st Choice did not intend to flagrantly violate motor carrier laws. The alleged violations do not constitute the flagrant, illegal activity necessary for a finding that the Applicant is unfit.

Finally, with respect to Bester's claims that 1st Choice has no willingness or ability to comply with and learn about responsibilities of regulated motor carriers, the record suggests a different conclusion. The management of 1st Choice has expressed a willingness and desire to participate in and learn more about the responsibilities of a regulated motor carrier. Kilgore testified that he intends to take advantage of and participate in motor carrier education programs.

#### Proof of Need

The shipper witnesses for 1st Choice only testified regarding need for moving service in the Minneapolis/St. Paul Metro Area. There is no support in the record for moving services outside of the Metro Area.

The Judge notes that the Applicant has only presented two shipper witnesses in support of need for the proposed transportation services. The Judge stated at the hearing that these two witnesses alone were insufficient to establish a statewide need for household goods moving authority. The Judge was initially inclined to conclude that the Applicant had failed to establish ne

for any of the proposed transportation services. However, there are two reasons why the Judge has been persuaded to the opposite view. Those reasons are:

- (1) The unique problems of proof required to establish need in a household goods authority application and
- (2) The two witnesses are unusual in the sense that they have a current need for a moving service and they have had much experience needing moving services in the past.

The Board's predecessor, the Public Utilities Commission and the Court Appeals have recognized that there are unique problems of proof for an applicant seeking support to ship household goods. Five Star Trucking, Inc. v. Minnesota Transportation Regulation Board, 370 N.W.2d 666, 670 (Minn. App. 1985). Dawn Moving and Storage, Inc. IRCC 25157, IRCC 34535, (November 8, 1976). These cases establish that, by its very nature, the need for shipping household goods is more sporadic and less consistent than the transportation of general commodities, for example. It was argued in Five Star that greater weight must be given to the testimony offered than might be given if the applicant had applied to move other types of freight. The standards applied to proof of need in general freight cases should not be applied to proof of need in household goods cases by the very nature of the difficulty producing witnesses for the hearing. Individuals move relatively infrequently and the decisions to move do not allow for extensive future planning. It is difficult to produce witnesses who will testify regarding their particular needs for a moving service. The applicant in Five Star obtained statewide household goods moving authority without a single individual coming forth to state he personally had a need for the services of a household goods mover. All testimony in Five Star came from corporate representatives indicating that they have a need for a household goods mover to assist them with moves of their employees.

The Applicant argued that the witnesses should be viewed as representative of need for the proposed service at one of the geographical points in the statewide application. The Applicant seems to argue that it would be adequate to establish need for the Minneapolis/St. Paul Metropolitan Area by the two witnesses who serve as representatives of the area for which they are testifying. The Judge agrees with this argument and has concluded that the witnesses establish a need for the proposed services within the Minneapolis/St. Paul Metropolitan Area.

Mr. Walters and Mr. Brown testified that they would be in need of a household goods mover in the near future to move them from their current location to another location within the Twin Cities Metropolitan Area. However, their testimony is significant, not only because of these planned upcoming moves, but also because these two witnesses have approximately 10 household moves between them in the last 15 years. In addition, with respect to the need issues they address, they did so with remarkable detail. For example, Mr. Walters' testimony showed that he had spent some time calling household goods movers and attempting to evaluate their services. He found that certain add-on charges were different from carrier to carrier and that differences made comparison of carriers difficult. He supported 1st Choice because the price for the service was easily understood as compared to charges of other motor carriers, was within his price range and because he wanted to support and believed that there was a need for a minority household goods

moving service. Mr. Walters had moved six times in the past six years, to and from the Minneapolis/St. Paul area.

The other witness, Mr. Brown, was expecting to move within the next nine months and had previously moved four years before. Before that Mr. Brown moved three other times. Each time he used friends or relatives because of his perception of the cost for using a household goods mover. Mr. Brown supported the Application in part because he believed that there was a need for a minority household goods mover.



### Existing Carriers

Bester's primary argument is that there is an overcapacity of Household Goods Carriers and if a person wants to become a household goods mover, he should buy a permit from a current permit holder. Mr. Bester stated "We object to your getting authority by just applying." Bester does not assert that it offers services that fully and adequately meet the needs of the target market to be served by the applicant.

Bester does not claim that it solicits business from the target market identified in this proceeding. Bester's base rate for moving services is \$74.50 per hour, approximately \$20.00 more than that proposed by 1st Choice. Bester does not advertise in the Black Pages and does not attempt to solicit business from the target market solicited by 1st Choice.

Bester called as witnesses Harco Moving, Jim's Transfer and R&J Howe. However, the Judge has found the testimony of these witnesses not credible for the following reasons. Each of the witnesses was familiar with the Board's filing process and were aware that they, as motor carriers, could file a protest of the Application if the requested authority would adversely affect their authority. Harco Moving, Jim's Transfer, and R&J Howe did not file a protest of 1st Choice's application for authority. After the hearing was scheduled by the Board, these movers or carriers could have petitioned to intervene in the proceeding if they could establish that their interests would be adversely affected by the application. They did not file petitions to intervene. When asked why they did not protest the application or petition to intervene, the witnesses indicated that either the matter "slipped my mind" or "we don't receive the Board Bulletin". This testimony suggests that these witnesses were not concerned enough about the application to protest or to intervene. However, at the hearing they asserted that their businesses will be adversely affected. It is difficult to believe that their circumstances have changed since the time that they had an opportunity to file protests or to intervene in this proceeding. The Judge finds the testimony unbelievable.

Even if the testimony of these witnesses was believable, these witnesses do not offer services to meet the needs of the target market. Jim's Transfer is limited because it is in bankruptcy. The witnesses do not solicit moving service business from the target market. They do not advertise in the Black Pages and do not network with businesses focused on serving low income and minority persons. Most of the testimony of these witnesses relates to general overcapacity in the household goods moving industry. The Judge finds that even assuming overcapacity in the household goods industry, the needs of the target market are not being met.

Courts have established several principles that aid in determining whether or not existing carriers can fully and adequately meet the need established

a motor carrier permit proceeding. First, the Supreme Court has stated that "the transportation policy of this state does not insulate existing carriers against competition." American Courier Corp. v. Loomis Armored Car, Inc., 200 N.W.2d 175, 180 (Minn. 1972). Existing carriers are not to be insulated from new competition where such competition will provide benefits to the public. Appeal of Signal Delivery Service, Inc., 288 N.W.2d 707, 712; American Courier Corp., 200 N.W. 2d at 180. Thus Bester should not be permitted to use the requirements of Minn. Stat. § 221.121, subd. 1 as a means of preventing additional competition, particularly in this instance where 1st Choice may be providing a service existing carriers are not willing to provide. Bester has taken the position that 1st Choice should purchase a

permit from an existing carrier instead of applying for a new authority. By opposing new authority applications and encouraging purchase of existing authority Bester seeks to merely preserve or enhance the value of its permit. Bester should not be allowed to use this proceeding to preserve or enhance the value of its permit.

Courts have also stated that the "consequence of denying the petition requiring use of existing carriers" is another factor that may be considered. American Courier Corp., 200 N.W.2d at 180. Requiring the target market to use existing carriers may result in the target market not being served by a reasonably priced carrier or in the continuing use of rental trucks and assistance of friends to move household goods. Cost is another factor that should be considered when determining whether existing carriers fully meet a shipper's transportation needs. The Supreme Court has stated that, "a rate advantage offered by the Petitioner which promotes the shipper's adoption of a service to meet its needs" is also a relevant factor to consider in determining whether existing carriers adequately meet a shipper's needs. American Courier Corp., 200 N.W.2d at 180. 1st Choice has specifically priced its service so that it is among the lowest cost movers in the Twin Cities area.

For all of these reasons, the Administrative Law Judge has concluded that Bester has failed to demonstrate that existing carriers can meet the need.

AEG